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No. 85-6324

IN THE

SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
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October Term, 1985

JOHNNY WATKINS, JR.,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court should consider Petitioner's Edwards v. Arizona, claim when it was not raised in the Supreme Court of Virginia.

2. Whether Petitioner's constitutional rights have been violated by the introduction at his sentencing for capital murder of evidence of a crime for which Petitioner was subsequently convicted.

3. Whether the State was required to provide Petitioner a private investigator absent any showing of necessity.

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STATEMENT OF THE CASE

The Barker Case

Johnny Watkins, Jr., was indicted for the capital murder of Betty Jean Barker, in the commission of robbery, the robbery and use of a firearm in the commission of a felony. The trial was conducted before a jury in the Circuit Court of the City of Danville. Watkins was convicted on all counts, and the jury fixed his sentence at life for the robbery, and two (2) years for the use of a firearm.

Pursuant to the bifurcated procedure for capital cases, § 19.2-264.4 of the Code of Virginia, a sentencing proceeding was conducted at which time the Commonwealth introduced evidence in aggravation and Watkins introduced evidence in mitigation. After deliberation, the jury fixed Watkins' sentence at death for the capital murder. A post sentencing hearing was conducted by the Court pursuant to § 19.2-264.5 at which time the Court affirmed the sentence of death. The trial court entered judgment on July 13, 1984.

The Buchanan Case

In a subsequent trial, another jury found Watkins guilty of the capital murder of Carl Douglas Buchanan on November 22, 1983, in the commission of robbery while armed with a deadly weapon, the robbery itself, and use of a firearm in the commission of a felony. Pursuant to the bifurcated procedure of § 19.2-264.4, the jury fixed his punishment for capital murder at death. After consideration of the post sentence report, the trial court affirmed the sentence of death.

The Supreme Court consolidated these two cases, granted Watkins an automatic appeal, and affirmed his convictions and sentences in a written opinion on June 14, 1985. Watkins v. Commonwealth, 229 Va. 469, 331 S.E.2d 422 (1985).

STATEMENT OF FACTS

The Barker Case[1]

On Sunday, November 13, 1983, Betty Jean Barker went to work at Kwik Shop, arriving a little after 11:00 p.m. She was filling in for a fellow employee who had been injured in an accident.

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[1]References are to the Joint Appendix filed in the Supreme Court of Virginia (A. _____).

(A. Vol. I, 442,463). Ellen Boaz, the employee whom Betty Jean relieved, called Betty Jean around 2:00 a.m. on November 14, and talked to her for 15-20 minutes. Algie Pillow, a regular customer, went by the Kwik Shop to purchase some gas. He arrived at 2:40 a.m. and purchased the gas from Betty Jean. No one else was present when he left at 2:45 a.m. (A. Vol. I, p. 442-47). At 3:15 a.m., William Arnold and His girl friend entered the Kwik Shop but were unable to find anyone to serve them. A man who was in the store indicated that he, too, had been unable to find any employee, but had noticed the cash drawer was open. (A. Vol. I, p. 451). Arnold then looked behind the counter and found Betty Jean Barker on the floor. He checked her but was unable to find any pulse. Arnold then called the police. (A. Vol. I, p. 452).

The Life Saving Crew arrived at 3:28 a.m. and likewise could not find any pulse. Betty Jean Barker's body, however, was still warm. (A. Vol. I, p. 471-73).

An autopsy revealed three gunshot wounds in the body of Betty Jean Barker. One in the right cheek, one in the upper right chest, and one in the upper left chest. The wound in the upper right chest perforated the aorta, and was the fatal wound. (A. Vol. II, p. 585-94). A fourth bullet was found entangled in the sweater worn by the victim. (A. Vol. II, p. 584). These four bullets were marked and submitted to William Conrad, a firearms examiner. (A. Vol. II, p. 585).

During the early evening of November 13, 1983, the defendant and others gathered at the home of Kenny Fitzgerald to play cards. (A. Vol. I, p. 481; Vol. II, p. 490, 650-51). During the course of the evening the defendant lost money in the card game, and borrowed $10.00 from Fitzgerald before leaving. (A. Vol. I, p. 485, Vol. II, p. 494).

Quentin Nash, testifying on behalf of the Commonwealth, admitted that he had been found guilty of these offenses and was awaiting sentencing. His testimony revealed that he and the defendant left Fitzgerald's around 1:30 a.m. on November 14, in

order for the defendant to give Nash a ride home. The defendant and Nash changed their minds and decided to go to a store. While driving around the defendant said he was tired of being broke and was going to rob the Kwik Store. (A. Vol. II, p. 498). They arrived at the Kwik Store around 2:40 a.m. and Nash agreed to act as a lookout. Some people were at the store so after purchasing some gas, they drove across the street to wait. (A. Vol. II, p. 499-501). When the people left the store, the defendant and Nash returned about 3:00 a.m. The defendant entered the store and Nash waited in the car. Having second thoughts about the robbery, Nash entered the store and began to shake his head at the defendant in an effort to prevent the robbery. (A. Vol. II, p. 504). The defendant had requested a pack of cigarettes, and when Betty Jean Barker opened the cash register, the defendant shot her twice causing her to fall. The defendant told Nash to get the cash drawer. Nash grabbed the cash drawer and ran out the door. When Nash ran out the door the defendant was leaning over the counter with the gun. Only two shots had been fired before Nash left the store. (A. Vol. II, p. 505-507).

On November 22, 1983, the police were investigating a murder-robbery which had occurred at Fast-Fare that day. The victim, Carl Buchanan, had been shot four times by a .22 caliber weapon. (A: Vol. I, p. 14-18, 30).

In connection with this investigation the police executed a search warrant for the premises occupied by the defendant's brother, Darnell. The police found a black jacket which had attached to it a hospital identification card for the defendant. In the pocket of this jacket the police found a .22 caliber pistol and eight empty shells. (A. Vol. I, p. 14, 17, 21, 30, 38). The defendant, who had entered the premises after the search, was shown the black jacket and another jacket and asked to whom they belonged. The defendant said the black jacket belonged to him. (A. Vol. I, p. 46).

The bullets taken from the body of Betty Jean Barker, as well as those taken from the body of Carl Buchanan, were compared

ballistically with the weapon found in the defendant's coat. A ballistics expert found that the bullets taken from both bodies had been fired from the .22 caliber pistol found in the defendant's coat. (A. Vol. II, p. 611, 804).

The Buchanan Case[2]

On November 22, 1983, Carl Buchanan was working at the Fast-Fare, a convenience store located on West Main Street in the City of Danville, Virginia. Buchanan was on duty during the third shift which placed him at the store in the very early morning hours. (A. Vol. I, pp. 375-378). He was known to be alive up until about 1:30 a.m. (A. Vol. I, pp. 376, 381)). At approximately 1:45 to 1:50 a.m., Terry Levi Cox arrived at the store. When he entered he saw no one. After a few minutes had passed and no clerk had appeared, Cox noticed the cash register was open and the money drawer was missing. (A. Vol. I, pp. 382-383). Suspecting a robbery, he looked behind the counter and found the body of Carl Buchanan. (A. Vol. I, p. 384, Vol. II, p. 405).

Cox called the police from a pay phone on the outside of the building. The police responded immediately and were on the scene by 1:55 a.m. (A. Vol. I, pp. 385-386). The investigation began with photographing the scene and searching for the victim's wallet (for identification purposes). No wallet was found. (A. Vol. I, p. 388). Other Fast-Fare employees were contacted and it was discovered that there was a two-dollar bill missing, the serial number of which had been recorded. (A. Vol. I, pp. 389-390). The Total amount of money missing from the cash register was $34.73. (A. Vol. II, p. 403).

Local merchants were advised on that same day to be on the look-out for the missing two-dollar bill. (A. Vol. II, p. 429).

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[2]References are to the Joint Appendix filed in the Supreme Court of Virginia. (A. ____).

As a result, the police were notified when a two-dollar bill bearing the reported serial number was tendered at Abe Koplen's clothing store that afternoon. (A. Vol. II, pp. 418-420). Darnell Watkins was subsequently identified as the presenter of that bill. (A. Vol. II, pp. 417, 421, 426-428, 430). Thereafter, a search warrant was obtained for the residence of Darnell Watkins to attempt to recover evidence relative to the robbery and killing of Carl Buchanan. (A. Vol. II, pp. 498-499).

The search occurred on the night of November 22, 1983. Found and seized during the course of that search were the following items: a single orange-brown leather left-hand glove; a Remington .22 caliber bullet box containing two live rounds; a jacket with a reindeer design containing credit cards, a driver's license and other items belonging to Carl Buchanan; and a dark blue or black jacket containing an identification badge of Johnny Watkins, a surgical glove, a knotted stocking, eight empty bullet cartridges, and a pistol loaded with six live rounds of ammunition. (A. Vol. II, pp. 503-504, 508-509, 512, 514, 518-526). These items were found in a bedroom shared by Darnell Watkins and his brother, the Petitioner. (A. Vol. II, pp. 434, 456, 505).

The Petitioner was taken to police headquarters and later advised he was being charged. The Petitioner asked why and was told that his brother was talking and the marked two-dollar bill had been traced to Darnell. (A. Vol. II, pp. 496-497). Subsequently, another two-dollar bill that the Petitioner had been concealing was recovered from him. It was wadded and wet "like he'd been chewing on it." (A. Vol. II, p. 515).

At trial, Darnell Watkins was called as a witness for the Commonwealth. He admitted that he had been involved with his brother in the commission of the crimes. His testimony revealed that sometime after midnight on November 22, 1983, he and the Petitioner left their home to go to a store and buy cigarettes. (A. Vol. II, pp. 436-437). They rode together with the Petitioner driving. During the trip, the Petitioner said, "I

might rob some place." (A. Vol. II, p. 439). They drove past the Fast-Fare store once and then turned around and went back. Having then determined that the clerk was alone, the Petitioner entered the store while Darnell waited in the car which was parked directly in front of the door. (A. Vol. II, pp. 439-442). From that vantage point, Darnell saw the Petitioner point a gun at the clerk and then observed the score clerk fall backwards. The Petitioner went to the other side of the counter and took the cash drawer from the cash register. Darnell then heard two shots and saw the Petitioner bend down behind the counter. (A. Vol. II, pp. 442-445). The Petitioner returned to the car, carrying the cash drawer and a wallet. As they drove away, Darnell asked the Petitioner if he had shot "the guy." Finally the Petitioner replied that he had shot the man three or four times in the head and chest. (A. Vol. II, pp. 446-448).

Subsequently, the cash drawer and wallet were discarded in a storm sewer after their contents had been removed. (A. Vol. II, pp. 469-451). At Darnell's direction, the police later recovered the cash drawer, but the wallet had apparently washed away. (A. Vol. II, pp. 500-501). On the night of the killing, the Petitioner was wearing the jacket with the reindeer design and a glove on one hand. (A. Vol. II, p. 452).

Additional testimony presented by Darnell Watkins, and confirmed by the brothers' aunt, Thelma Stuart, revealed that the Petitioner attempted to have Darnell accept responsibility for the robbery and he (the Petitioner) would claim the murder. The Petitioner wanted this done so "he wouldn't get the chair." (A. Vol. II, pp. 453-464, 485). Thelma Stuart also indicated that the Petitioner had admitted the killing to her. (A. Vol. II, p. 484).

An autopsy was performed on the body of Carl Buchanan by Dr. David W. Oxley of the Medical Examiner's Office. Four gunshot wounds were discovered. One wound was located in the area of the left temple, forward of the left ear. No residue was found on the skin around that wound. The bullet passed towards the rear

of the victim's head into the heavy bone just behind the ear. (A. Vol. II, p. 534). A second wound was found on the left upper chest. Gun powder residue was noted on the deceased's clothing around this wound. The bullet traveled towards the back, downward and to the right. It pierced the left lung and the aorta. A third wound was located on the left mid-chest. Gun powder residue was in the area of this wound also. This bullet traveled in roughly the same direction as the other shot to the chest. It punctured both lungs. The fourth wound was on the right lower back and no gunshot residue was in the area. The bullet passed upwards and to the left. (A. Vol. II, pp. 535-536). The wounds which showed residue were inflicted from a range of six to twenty-four inches. Those that showed no residue were inflicted from a range of more than twenty-four inches. (A. Vol. II, pp. 536-537). Either of the two chest wounds would have been fatal. (A. Vol. II, 542-543).

The bullets which were removed from the body and the gun found in the Petitioner's jacket were analyzed by William E. Conrad, a firearms expert. He concluded that one of the bullets from the chest had definitely been fired from the Petitioner's gun and the other three bullets exhibited characteristics consistent with having been fired by that weapon. (A. Vol. II, pp. 556, 561-562).

At the sentencing phase of trial, evidence was presented which showed that the Petitioner had committed the Barker capital murder some eight days prior to the instant offense.

ARGUMENT

I.

PETITIONER'S EDWARDS v. ARIZONA, 451 U.S. 477 (1981), CLAIM IS NOT PROPERLY BEFORE THIS COURT.

In his petition for certiorari, Petitioner asserts that statements he gave to police were inadmissible and should not have been used against him.[3] Petitioner premises his argument

upon an assertion that he was interrogated after he asserted his right to counsel in violation of this Court's decision in Edwards v. Arizona, 451 U.S. 477 (1981).

Prior to his trial Petitioner moved to suppress statements given by him to the police. His motion to suppress was grounded upon an alleged violation of Miranda v. Arizona, 384 U.S. 436 (1966). The Petitioner contested the statements on the ground of voluntariness.

On appeal the Petitioner presented the Supreme Court of Virginia with this argument:

> The Trial Court Erred B Overruling Defendant's Motion to Suppress Certain Incriminating Statements Made To Police Subsequent To His Arrest, In Violation Of The Constitutional Rights Recognized By Miranda v. United States [sic], 384 U.S. 436 (1966).

Petitioner's Brief, p. 20. At no time in his brief did Petitioner ever cite Edwards v. Arizona, or argue that he was entitled to relief upon the theory that he had been improperly interrogated after requesting counsel. See Supplemental Appendix for Petitioner's Argument to the Virginia Supreme Court on this issue. His only reference to the issue of counsel was that the record showed a conflict between the detective and Petitioner over whether Petitioner had invoked his right to have an attorney present during the interrogation.

The Supreme Court of Virginia ruled upon the question Petitioner presented to it and found that Petitioner's statement was voluntarily given. Watkins v. Commonwealth, 229 Va. at 476-478, 331 S.E.2d at 429-430.

It is clear that Petitioner has never presented his Edwards v. Arizona claim to the Supreme Court of Virginia.

It was very early established that this Court would not decide federal constitutional issues raised for the first time on a petition to review state court decisions. Cardinale v.

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[3]The statements about which Petitioner complains were introduced by the Commonwealth only during the penalty phase of Petitioner's trial. Accordingly, the resolution of this issue would have no impact upon the guilt phase of Petitioner's trial.

Louisiana, 394 U.S. 437 (1969). The rationale underlying this Court's policy of refusing to review issues raised for the first time in this Court in that in a federal system it is important that state courts be given the first opportunity to consider the applicability of constitutional challenges, and to assume that this Court would have an adequate record before it prior to rendering decisions of constitutional magnitude. Hill v. California, 401 U.S. 797 (1971).

It is therefore apparent that this Court should not grant the petition for a writ of certiorari based upon Petitioner's Edwards v. Arizona claim. Beck v. Washington, 369 U.S. 541 (1962); Rugendorf v. United States, 376 U.S. 528 (1964).

ARGUMENT

II.

THE ADMISSION DURING THE SENTENCING PHASE OF EVIDENCE OF A CRIME FOR WHICH DEFENDANT HAD NOT BEEN CONVICTED WAS NOT ERROR.

At the time of his trial the Petitioner had been indicted but not tried for the capital murder of Carl Buchanan in the commission of robbery. During the sentencing phase of Petitioner's trial for the capital murder of Betty Jean Barker, the trial court allowed the Commonwealth to introduce evidence relative to the murder and robbery of Carl Buchanan.

The Commonwealth introduced photographs of Fast-Fare Store showing a cash register drawer missing, and the body of Carl Buchanan. (A. Vol. II, p. 781). Evidence was introduced showing that $34.93 was missing from the cash register. (A. Vol. II, p. 793). The medical examiner testified that he had removed four bullets from the body of Carl Buchanan and had turned them over to William Conrad, a firearms examiner. (A. Vol. II, p. 795). The firearms examiner testified that one of the bullets retrieved from the body of Carl Buchanan was fired from the

pistol which had been found in the pocket of the defendant's jacket. (A. Vol. II, p. 804). Lastly, a statement given by the Petitioner on November 28, 1983, in which he admitted shooting Carl Buchanan, was introduced into evidence. (A. Vol. II, p. 809-810).

The Supreme Court of Virginia found that admissible evidence in the sentencing phase is not limited to the defendant's record of convictions, and may include evidence of other crimes for which a defendant has not been convicted. Watkins v. Commonwealth, 229 Va. at 488, 331 S.E.2d at 436.

It was entirely appropriate under the state of the law for the jury to have before it during the sentencing phase "as much information...as possible when it makes the sentencing decision." Gregg v. Georgia, 428 U.S. 153, 204 (1976). To the same effect is Lockett v. Ohio, 438 U.S. 586 (1978).

Evidence of crimes for which the defendant had not been convicted have been admitted in the sentencing phase by other courts. In Cline v. State, 656 S.W.2d 684 (Ark. 1983), the court allowed a witness to testify that the defendant had previously committed another felony by the use or threat of violence. Likewise, in State v. Rault, 445 So.2d 1203 (La. 1984), the court allowed the state to offer testimony linking the defendant with embezzlement and with a possible attempted murder. The Court of Criminal Appeals rejected a defendant's argument that error had been committed when the trial court admitted at the punishment stage evidence of an earlier unadjudicated robbery-murder. Williams v. State, 668 S.W.2d 692 (Tex. Ct. Crim. App. 1983). The court reasoned that such argument was without merit citing Jurek v. Texas, 428 U.S. 262 (1976). See also Milton v. Procunier, 744 F.2d 1091 (5th Cir. 1984), cert. denied, 105 S.Ct. 2050 (1985).

It should be noted that Petitioner was convicted of the capital murder of Carl Buchanan and his conviction has been affirmed by the Supreme Court of Virginia. Watkins v. Commonwealth, 229 Va. at 486, 331 S.E.2d at 435. This fact

disposes of Petitioner's argument that "a jury could rely on evidence of a subsequent crime in imposing a death sentence, and a second jury could acquit the defendant of that very crime later." (Petition, p. 8).

ARGUMENT

III.

THE STATE WAS NOT REQUIRED TO FURNISH PETITIONER WITH A PRIVATE INVESTIGATOR.

The Petitioner filed a written motion requesting that the court provide an investigator to aid in the preparation of his defense. The motion claimed that the right to effective assistance of counsel would be denied if an indigent defendant in these circumstances was denied independent investigatory capabilities. (A. Vol. I, p. 16). A contemporaneous request for appointment of additional counsel was granted, but the court refused to authorize the expenditure of public funds to hire an investigator for the Petitioner. (A. Vol. I, pp. 182-185).

The facts of this case demonstrate no need for an investigator. The prosecution's case was outlined for the defendant prior to trial, including the names of witnesses. (A. Vol. I, pp. 185-186). As noted by the trial judge, by the time the proceedings reached the stage of pre-trial motions, the Commonwealth's investigation was essentially complete and the facts of the case were "straightforward." (A. Vol. I, pp. 184-185). The Petitioner had admitted shooting Carl Buchanan and participating in the theft of the cash drawer. (A. Vol. II, pp. 810-811). There was no need to search for additional witnesses or attempt to find previously undiscovered evidence. Indeed, Petitioner's motion and argument made no reference to a particularized need for the investigator. No specific task was alleged to be needed which required the assistance of an investigator. Under the facts of this case Petitioner made no showing whatsoever that an investigator was necessary. See Caldwell v. Mississippi, 105 S.Ct. 2633, 2637 n. 1 (1985).

CONCLUSION

For the foregoing reasons, the Respondent respectfully submits that the petition for certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James E. Kulp, Senior Assistant Attorney General of Virginia, and a member of the Bar of this Court, do certify that on this 10th day of March, 1986, one copy of this Brief In Opposition was mailed to:

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James E. Kulp

James E. Kulp
Senior Assistant Attorney General

SUPPLEMENTAL APPENDIX

I

THE TRIAL COURT ERRED BY OVERRULING DEFENDANT'S MOTION TO SUPPRESS CERTAIN INCRIMINATING STATEMETNS MADE TO POLICE SUBSEQUENT TO HIS ARREST, IN VIOLATION OF THE CONSTITUTIONAL RIGHTS RECOGNIZED BY MIRANDA V. UNITED STATES, 384 U.S. 436 (1966) et. seq.

Subsequent to being taken into custody, defendant executed three (3) separate advice of rights forms provided by various members of the Danville Police Department and gave, in essence, two statements relating to the murder/ robbery of Carl Buchannan on November 22, 1983, at the West Main Fast Fare of Danville. (Refer to Commonwealth Exhibit #'s 35, 36, 37, 38 and 39, App. Vol. #2, pages 897 through 903, and Commonwealth Exhibit #Q App. Vol. #2, pages 950 through 952.) Defendant filed a pre-trial motion to suppress certain incriminating statements made to police subsequent to his arrest and a suppression hearing was held on March 8, 1984 in Danville Circuit Court. At the conclusion of the suppression hearing Judge Ingram ruled that the statements were admissible and the motion to suppress was overruled. (App. Vol. I, page 153).

Defendant concedes that a confession is evidence and that under the mandate of the Fifth Amendment, its admissibility depends upon its voluntariness, a factual question which must be resolved by the trier of fact. Witt v. Commonwealth, 215 Va. 670, 674, 212 S.E. 2d 293, 297 (1975). The measure of the burden of proof with respect to factual questions underlying the admissibility of evidence is proof by a pre-ponderance of evidence and that same measure applies the burden of proving voluntariness of the confession. Id. at page 674. In determining whether the Commonwealth has met its burden, the trial court, acting as a fact-finder, must evaluate the credibility of the witnesses, resolve conflicts of testimony and weigh the evidence as a whole. Defendant argues in the case at bar that this standard was not followed and that

the trial court erred by admitting a statement made by the defendant to Detective M. O. Dalton on November 28, 1983, into evidence at the sentencing phase of the aforesaid trial.

According to the evidence introduced relating to the statement of November 28, 1983, only two persons, Detective M. O. Dalton of the Danville Police Department and the defendant were present when he made his statement at the Pittsylvania County Jail on the morning of November 28, 1983 at approximately 8:12 a.m. Dalton and Watkins contradicted one another as to whether Watkins invoked his right to have an attorney present for the interrogation. Dalton repeatedly asserted that the defendant never requested the presence of a lawyer (Dalton, App. Vol. #I, pp. 142-143). On the other hand, Watkins, at the suppression hearing, testified that he told Dalton that "...I won't gonna answer no questions". (Watkins, App. Vol.#I, page 130). Watkins further testified that the waiver made reference to the fact that he could stop at any time he wanted and that Dalton persisted in asking questions in spite of his invocation of that privlege. (Watkins, App. Vol. I, page 130-131). Defendant concedes that a statement made knowingly, voluntarily and intelligently upon advise of ones miranda rights is admissible in evidence, but argues in this case that the detective expressly ignored his request for counsel shortly after defendant signed a waiver of his rights. Defendant testified that he gave the statement only "after I seen he was gonna keep nagging me". (Watkins App. Vol. I, page 137). It is defendant's contention that his Fifth Amendment right against self-incrimination simply was ignored and the office proceeded to obtain the incriminating statement which he sought. Defendant argues that the factual findings relating to voluntariness of the confession in issue here plainly was wrong and thus the trial court erred in admitting this statement into evidence.